In re: MARYSVILLE ENTERPRISES, INC., d/b/a MARYSVILLE HOG BUYING CO., JAMES L. BREEDING, AND BYRON E. THORESON.
P. & S. Docket No. D-98-0027.
Decision and Order as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding filed January 4, 2000.

Packers and Stockyards Act – Failure to pay – Insufficient funds checks – Registration suspension – Willful violations – Alter ego – Sanction policy – Preponderance of the evidence.

The Judicial Officer concluded that Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b) by purchasing livestock and failing to pay, when due, the full purchase price of the livestock and by issuing checks in purported payment of the purchase price of livestock, which checks were returned by the bank upon which the checks were drawn because there were not sufficient funds on deposit and available in the account to pay such checks when presented. The Judicial Officer suspended Respondents as registrants under the Packers and Stockyards Act for a period of 5 years and directed Respondents to cease and desist from: (a) failing to pay, when due, the full purchase price of livestock, (b) failing to pay the full purchase price of livestock, and (c) issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which the checks are drawn to pay checks when presented. The Judicial Officer held that Respondents' violations were willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) using either the standard for willfulness adopted by the United States Court of Appeals for the Tenth Circuit in *Capitol Packing Co. v. United States,* 350 F.2d 67 (10th Cir. 1965) or the standard for willfulness adopted by the United States Department of Agriculture. The Judicial Officer held that evidence that Respondents had violated provisions of the Packers and Stockyards Act and the Regulations that were not alleged in the Complaint, where the evidence was introduced merely for the purpose of proving that Respondents willfully violated the provisions of the Packers and Stockyards Act alleged in the Complaint, could be considered. The Judicial Officer also found that Respondent Breeding was the *alter ego* of Respondent Marysville. The Judicial Officer found a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act was in accord with the United States Department of Agriculture's sanction policy, the sanction recommendation of the administrative officials charged with achieving the congressional purpose of the Packers and Stockyards Act, and the periods of suspension imposed in similar cases. The Judicial Officer rejected Respondents' contention that a suspension of Respondent Breeding as a registrant under the Packers and Stockyards Act was excessive and rejected Respondents' contention that Respondent Breeding's 40-year involvement in the livestock industry without a violation of the Packers and Stockyards Act, Respondents' reliance on a bank to pay livestock sellers, and Respondent Breeding's age were mitigating circumstances. Further, the Judicial Officer stated that he gave no weight to collateral effects of a suspension on a respondent. The Judicial Officer rejected Respondents' contention that they were denied due process because Respondents raised the issued for the first time on appeal. The Judicial Officer also stated that, contrary to Respondents' contention, proof that a respondent violated an act administered by the United States Department of Agriculture does not "guarantee" the conclusion that the respondent's violation was willful.

Eric Paul, for Complainant.
Jennifer P. Kyner and Brian E. Engel, Kansas City, Missouri, and Darold D. Bolton, Marysville, Kansas, for Respondents Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Deputy Administrator, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture

[hereinafter Complainant], instituted this disciplinary administrative proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) [hereinafter the Packers and Stockyards Act]; the regulations promulgated under the Packers and Stockyards Act (9 C.F.R. §§ 201.1-.200) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on July 8, 1998.

The Complaint alleges that Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson willfully violated the Packers and Stockyards Act by purchasing livestock and failing to pay, when due, the full purchase price of the livestock and by issuing checks in purported payment of the purchase price of livestock, which checks were returned by the bank upon which the checks were drawn because there were not sufficient funds on deposit and available in the account to pay such checks when presented (Compl. ¶¶ II-III).[1]

On August 28, 1998, Respondent Breeding filed Answer and Affirmative Defenses of Respondent James L. Breeding, denying the material allegations of the Complaint and on September 3, 1998, Respondents filed Amended Answer and Affirmative Defenses of Respondents James L. Breeding and Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co. [hereinafter Amended Answer], denying the material allegations of the Complaint.

The ALJ presided over a hearing on March 10, 11, and 25, 1999. Eric Paul, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Jennifer P. Kyner, Brian E. Engel, and Darold D. Bolton represented Respondents.

On June 8, 1999, Respondents filed Respondents' Proposed Findings of Fact, Proposed Conclusions of Law and Post-Trial Brief [hereinafter Respondents' Brief]; on June 11, 1999, Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law and Order as to Respondents Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co. and James L. Breeding and Brief in Support Thereof [hereinafter Complainant's Brief]; on July 20, 1999, Respondents filed Respondents' Reply to Complainant's Proposed Findings of Fact, Conclusions of Law and Order; and on July 20, 1999, Complainant filed Complainant's Reply Brief.

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[1]Complainant and Byron E. Thoreson agreed to the entry of a Consent Decision pursuant to section 1.138 of the Rules of Practice (7 C.F.R. § 1.138). Administrative Law Judge James W. Hunt [hereinafter the ALJ] entered the Consent Decision on March 5, 1999. *In re Marysville Enterprises, Inc.* (Decision as to Byron E. Thoreson), 58 Agric. Dec. 472 (1999). Therefore, in this Decision and Order as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding, I limit the references to allegations against, responses by, and filings by Byron E. Thoreson, to those necessary to describe the status of this proceeding as it relates to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding [hereinafter Respondents].

On September 3, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) found that Respondents purchased livestock and failed to pay, when due, the full purchase price of $76,323.51 for the livestock; (2) found that Respondents issued checks in purported payment for livestock in the amount of $87,634.58, which checks were returned by the bank upon which they were drawn because the account did not have sufficient funds to cover the checks; (3) concluded that Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b); (4) directed Respondents to cease and desist from (a) failing to pay, when due, the full purchase price of livestock, (b) failing to pay the full purchase price of livestock, and (c) issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which the checks are drawn to pay the checks when presented; and (5) suspended Respondents as registrants under the Packers and Stockyards Act for a period of 2 years (Initial Decision and Order at 11, 13-14).

On October 19, 1999, Respondents appealed to the Judicial Officer and on October 22, 1999, Complainant appealed to the Judicial Officer. On November 30, 1999, Respondents filed Respondents' Response to Complainant's Appeal Petition and Complainant filed Complainant's Reply to Respondents' Appeal Petition. On December 1, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I agree both with the ALJ's findings that Respondents purchased livestock and failed to pay, when due, the full purchase price of $76,323.51 for the livestock and issued checks in purported payment for livestock in the amount of $87,634.58, which checks were returned by the bank upon which they were drawn because the account did not have sufficient funds to cover the checks, and with the ALJ's conclusion that Respondents willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a), 228b). However, while the final Decision and Order retains much of the ALJ's Initial Decision and Order, I have not adopted the ALJ's Initial Decision and Order as the final Decision and Order because I disagree with the ALJ's imposed sanction, with the ALJ's conclusion that Respondent Breeding was not the *alter ego* of Respondent Marysville, and with the ALJ's discussion of willfulness.

Complainant's exhibits are designated by "CX," Respondents' exhibits are designated by "RX," and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 9—PACKERS AND STOCKYARDS

SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS

§ 201. "Stockyard owner"; "stockyard services"; "market agencies"; "dealer"; defined

When used in this chapter–

. . . .

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

. . . .

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business. If, after the lapse of the period allowed for appeal or after the affirmance of such penalty, the person against whom the civil penalty is assessed fails to pay such penalty, the Secretary may refer the matter to the Attorney General who may recover such penalty by an action in the appropriate district court of the United States.

SUBCHAPTER V—GENERAL PROVISIONS

. . . .

§ 228b. Prompt payment for purchase of livestock

(a) Full amount of purchase price required; methods of payment

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided,* That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

. . . .

(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

7 U.S.C. §§ 201(d), 213, 228b(a), (c).

Facts

Respondent James L. Breeding has, since 1975, owned and operated Marysville Livestock & Commission Company, Inc., a registered market agency selling livestock on a commission basis at its auction sale barn in Marysville, Kansas (Tr. 247-48). Respondent Breeding formed a corporation identified as Marysville Enterprises in 1979 and in 1994, registered Marysville Enterprises, Inc., d/b/a Marysville Hog Company, as a dealer with the Packers and Stockyards Administration[2] (Tr. 181-82; CX 1 at 4, CX 40). Respondent Breeding was, at all times material to this proceeding, the president and sole owner of Respondent Marysville, which he established for the purpose of buying hogs from producers and other dealers for resale to packers for slaughter. Except for a small number of feeder pigs, Respondent Marysville sold its hogs directly to packers. Respondent Marysville's office was located at the Marysville Livestock & Commission Company, Inc., auction sale barn in Marysville, Kansas. (Tr. 180-88, 210-11, 239-40, 253-55; CX 1.)

Respondent Breeding hired Byron E. Thoreson, an experienced hog buyer, to buy and sell hogs for Respondent Marysville. Mr. Thoreson obtained hog prices from packers and then negotiated a purchase price for hogs from the sellers. The hog producers would either deliver hogs to Mr. Thoreson at the sale barn, where Mr. Thoreson, sometimes with assistance from Respondent Breeding, would weigh the hogs, or the producers would deliver the hogs themselves, or on trucks provided by Mr. Thoreson, directly to the packers. Mr. Thoreson said he relied on the word of the sellers for the number and weight of the hogs. He said he would also get a count from the truck drivers, but indicated that their count was not very reliable. After assembling one or more loads of hogs from various sellers, he would ship them to a packer. The packers in turn would pay Respondent Marysville by check between 5 and 7 days after the hogs were delivered. Respondent Breeding said Respondent Marysville's gross profit was from $1.50 to $5 a head. Expenses included the transportation costs and the money Respondent Marysville paid to the sale barn for rent and upkeep. Mr. Thoreson was paid a salary and commission. (Tr. 181-94, 215-17, 255-59, 305, 309, 313.)

The 5- to 7-day period from the time Respondent Marysville sold hogs to a packer for slaughter until Respondent Marysville received payment was referred to as the "pipeline," "inventory," or "accounts receivable" (Tr. 130-31, 184, 318-19).

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[2]Respondent Breeding was not registered individually as a dealer at times relevant to this proceeding. He registered as a dealer under the Packers and Stockyards Act on December 22, 1998. A letter from Marlys Sahlin, Acting Financial Supervisor, Packers and Stockyards Programs, informing Respondent Breeding of his registration as dealer, also advises Respondent Breeding that this disciplinary administrative proceeding may result in the suspension of Respondent Breeding's registration. (CX 41.)

Respondent Breeding did his banking with Exchange National Bank. When Respondent Breeding started Respondent Marysville, John Rypma, the bank's president until August 1996, agreed to provide Respondent Marysville with the same financial arrangement that the bank had with Marysville Livestock & Commission Company, Inc., by extending an existing $50,000 line of credit to Respondent Marysville. The bank also provided overdraft protection to cover Respondent Marysville's checks to the hog sellers until Respondent Marysville received payment for the hogs in the pipeline. In return for this service, a routine business practice, the bank did not pay interest on a custodial account controlled by Respondent Breeding. (Tr. 38, 71, 250-52, 303, 317, 390, 426-28.)

Over the next 3 years, Respondent Marysville's sales volume more than doubled. Sales for the first year of about $4,000,000 increased to over $9,000,000 for the year ending January 15, 1997. Respondent Marysville's line of credit was also increased over this period of time. It was raised to $200,000 in July 1996 and to $300,000 in December 1996. (Tr. 38-40, 308, 317-18.)

When Mr. Thoreson wrote a check to a producer, he made a copy which he attached to a form on which he recorded the date, seller's name, and the number and weight of hogs (CX 16 at 3). He gave this information to Respondent Breeding's wife, Gloria Breeding, whose job it was to record the information in a purchase and sales journal. Mr. Thoreson bought up to six loads of hogs a day with each load comprising 180 to 220 hogs and valued up to $25,000. Respondent Breeding said that, although Mr. Thoreson was a "good hog man," he was not satisfied with Mr. Thoreson's record-keeping. He said Mr. Thoreson did not always provide Gloria Breeding with all the invoices, but that he did provide the information when requested. When checks were received from a packer, Gloria Breeding was to record them in the journal. (Tr. 206-07, 309, 318, 326-28; RX 2.)

Respondent Breeding said he reviewed Respondent Marysville's profit and loss statement each month and talked with Mr. Thoreson about the business during the month. Although Respondents' line of credit was increasing, Respondent Breeding said he was not concerned because of the growing sales and the value of the hogs that Mr. Thoreson told him were in the pipeline. (Tr. 257-58, 277-79, 317-18.)

In August 1996, John Rypma, the bank official with whom Respondent Breeding had been doing business, left for another job. He was replaced as president by Marc Degenhardt who met with Respondent Breeding in September 1996, to review Exchange National Bank's loans to Respondents. Mr. Degenhardt said he told Respondent Breeding that, since the hog buying business was growing, there should be a reduction in the overdrafts and that, even though Respondent Breeding never missed making any loan payments, he (Mr. Degenhardt) did not intend for the bank to continue providing overdraft protection. Mr. Degenhardt also asked for information on the number of hogs in the pipeline. Over the next 3 months, Respondent Breeding attempted to compile this data. In December 1996, Mr. Degenhardt increased Respondent Marysville's line of credit to $300,000 to

cover Respondent Marysville's operations with "no more overdrafts." (Tr. 126-37.)

Early in January 1997, Mr. Degenhardt met with Respondent Breeding and his accountant, Markus Frese, who was also trying to determine for Respondent Breeding the number of hogs in the pipeline. Mr. Frese testified that, after reviewing Mr. Thoreson's records and Respondent Marysville's financial statements, he found that he could not account for approximately $450,000 in hogs or money. Mr. Frese said that Respondent Breeding, who until that time assumed the business was profitable, was "dumbfounded" when he received this information. The bank then sent a letter to Respondent Breeding stating that it would no longer honor overdrafts. When the bank began receiving overdrawn checks in January 1997 from hog sellers, it told Respondent Breeding to deposit funds to cover the checks. When Respondent Breeding was unable to deposit sufficient money, the bank refused to honor the checks, stamped "insufficient funds" on the checks, and returned the checks to the sellers. The bank then made all of Respondent Breeding's notes immediately payable. Twenty-seven producers who had sold $76,323.51 in hogs to Respondents in December 1996 and January 1997 went unpaid and another 15 producers who had sold hogs to Respondents had checks totaling $87,634.50 returned to them in January 1997 because of insufficient funds. (Tr. 18-27, 142-44, 155, 158, 371-75, 380; CX 3, CX 31.)

At about this time, Respondent Breeding contacted Raymond Minks, who was then senior auditor in the Packers and Stockyards Programs' Kansas City regional office, about his concern for the business. Mr. Minks conducted an investigation of Respondent Marysville's operations. Mr. Minks testified that he found that some checks were not recorded and that he could not determine the source of the hogs for which some checks from packers represented payment. Mr. Minks said that the transactions he could trace appeared to be profitable and that a person looking at Respondent Marysville's journal could assume the business was profitable. However, Mr. Minks also testified that, after examining bank statements, he found that Respondent Marysville's net cash position and loan balances indicated a deteriorating financial situation beginning in February 1996 and that this information was available to Respondent Breeding. Mr. Minks said that this information should have been a cause for concern and "raise a question how long these negative cash figures could continue." (Tr. 33-34, 47-51, 54, 64-65, 76-77, 80; CX 36.)

Mr. Frese, the accountant, said that his examination of Respondent Marysville's records indicated that, beginning in 1996, there were enough hogs in the pipeline to cover Respondent Marysville's costs and that the problem began later in October when the journal entries were not complete and there was a lack of information to match checks and deposits (Tr. 375, 379, 387).

The Complaint alleges that both Respondents were "dealers" within the meaning of the Packers and Stockyards Act and that they willfully violated sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a) and 228b).

Complainant also contends that Respondent Breeding is the *alter ego* of Respondent Marysville (Complainant's Brief at 7, 26-31). Respondents deny that they willfully violated the Packers and Stockyards Act and deny that Respondent Breeding was a dealer at the time the alleged violations occurred.

Discussion

Respondents' failure to pay, when due, the full purchase price of livestock and Respondents' issuance of checks in purported payment of the purchase price of livestock, which checks were returned by the bank upon which the checks were drawn because there were not sufficient funds on deposit and available in the account to pay such checks when presented, constitute violations of sections 312(a) and 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a) and 228b). Respondents' reliance on an agreement with the bank for a line of credit and for overdraft protection is not a defense to these violations.[3]

Respondent Breeding, although not registered at the time as a dealer and although he did not buy and sell hogs, is nevertheless deemed responsible for the violations. Respondent Breeding, as Respondent Marysville's president and sole owner, demonstrated his control over Respondent Marysville by hiring Mr. Thoreson to manage Respondent Marysville, reviewing his operations, and personally arranging for Respondent Marysville's line of credit and overdraft protection. The United States Department of Agriculture [hereinafter USDA] routinely issues orders applicable to the owners and officers of corporations when the evidence shows that these individuals were responsible for the corporate violations.[4] Accordingly, I find, in view of Respondent Breeding's ownership of and control over Respondent Marysville, that he was a dealer within the meaning of the Packers and Stockyards Act and, together with Respondent Marysville, was responsible for the violations.

Complainant further alleges that the violations were willful and seeks a sanction suspending Respondents' registrations as dealers for a period of 5 years. Respondents contend that, even if a finding is made that they violated the Packers and Stockyards Act, the violations were not willful and that under the

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[3] *See In re Jeff Palmer,* 50 Agric. Dec. 1762, 1773-76, 1778 (1991); *In re Ozark County Cattle Co.* (Decision as to National Order Buying Co. and Thomas D. Runyan), 49 Agric. Dec. 336, 350-52 (1990); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. 573, 584 (1987); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1094-95 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988).

[4] *See In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1519-20 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1076 (1990); *In re Britton Bros., Inc.*, 49 Agric. Dec. 423, 451-53 (1990); *In re Stull Meats, Inc.* (Decision as to Globe Packing Co. and Reuben Krasn), 49 Agric. Dec. 309, 328 (1990), *appeal dismissed*, No. 90-70191 (9th Cir. Jan. 11, 1991).

Administrative Procedure Act their registrations cannot be suspended without first affording them an opportunity to comply.

The Administrative Procedure Act provides that:

> **§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**
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> . . . .
>
> (c) . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

Many courts and the USDA hold that a violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[5] However, Respondents argue that the willfulness standard adopted

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[5] *See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1414 (1998); *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), 54 Agric. Dec. 590, 607 (1995), *aff'd*, 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Hardin County Stockyards, Inc.* (Decision as to Hardin County Stockyards, Inc., and Rex Lineberry), 53 Agric. Dec. 654, 658 (1994); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1529 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1772 (1991); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1071-74 (1990); *In re Ozark County Cattle* Co. (Decision as to National Order Buying Co. and Thomas D. Runyan), 49 Agric. Dec. 336, 355 (1990); *In re Top Livestock Co.*, 49 Agric. Dec. 294, 302 (1990); *In re Modesto Mendicoa*, 48 Agric. Dec. 409, 416 (1989); *In re Hugh T. (Tip) Hennessey*, 48 Agric. Dec. 320, 324 (1989); *In re Danny Cobb*, 48 Agric. Dec. 234, 280 (1989); *In re Edward Tiemann*, 47 Agric. Dec. 1573, 1578 (1988); *In re Paul Rodman*, 47 Agric. Dec. 885, 920 (1988); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. 1216, 1225 (1987); *In re Robert E. Parchman*, 46 Agric. Dec. 791, 796 (1987), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Doug Welch*, 45 Agric. Dec. 1932, 1951-52 (1986); *In re Richard N. Garver*, 45 Agric. Dec.

by the United States Court of Appeals for the Tenth Circuit is applicable to this proceeding because Respondents are located within jurisdiction of the Tenth Circuit. The standard adopted in *Capitol Packing Co. v. United States,* 350 F.2d 67, 78-79 (10th Cir. 1965), is that willfulness must be demonstrated by "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." Respondents contend that it is not shown that their violations were either intentional or a result of gross neglect.

The Packers and Stockyards Act explicitly requires each dealer purchasing livestock to pay the full purchase price of the livestock (7 U.S.C. § 228b(a)). Respondents knew, or should have known, that they had the duties under the Packers and Stockyards Act to pay, when due, the full purchase price for livestock, to refrain from issuing checks in purported payment of the purchase price of livestock without sufficient funds on deposit and available in the account to pay such checks when presented, and to operate with adequate finances to ensure that livestock sellers are paid. Respondent Breeding failed to oversee the operation of Respondent Marysville and maintain records in a manner that would enable him to ensure that there were sufficient funds available to pay producers who sold livestock to Respondent Marysville. Respondent Marysville's bank statements and schedules establish that Respondent Marysville experienced increasing overdrafts and line of credit loan amounts during 1996 and January 1997 (Tr. 31-36; CX 36, CX 37). Had Respondent Breeding not been grossly negligent with respect to the operation of Respondent Marysville, he would have known of this information and this information would have alerted Respondent Breeding to Respondent Marysville's

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1090, 1095 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 621 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Robert E. Stafford*, 43 Agric. Dec. 1833, 1837 (1984), *aff'd*, 782 F.2d 1049 (8th Cir. 1985) (unpublished); *In re Donald Hageman*, 42 Agric. Dec. 531, 544 (1983); *In re Hugh B. Powell*, 41 Agric. Dec. 1354, 1362 (1982); *In re J.A. Speight*, 33 Agric. Dec. 280, 302 (1974); *In re James J. Miller*, 33 Agric. Dec. 53, 83 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 609 (1968). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965).

serious financial problem that threatened Respondent Marysville's ability to pay for livestock, as required by the Packers and Stockyards Act.

Beginning in February 1996, Respondents lost track of hog purchases totaling $466,738.38 and did not discover that these purchases had not been entered in their purchase and sales journal until January 1997 (CX 38). Respondents' accountant also discovered, in January 1997, that Respondents delayed by 3 months the completion of Respondent Marysville's cost journals (Tr. 387-88). Respondents prepared monthly gross profit and loss estimates for their bank that were inaccurate because the only cost figures included were hog purchase costs, and the estimates omitted many of hogs purchased (Tr. 362; CX 38). Despite repeated requests from the Mr. Degenhardt, Respondent Breeding was unable to provide the Exchange National Bank with livestock accounts receivable and hog inventory figures (Tr. 143-44).

Discrepancies between the Annual Report of Dealer or Market Agency Buying on Commission filed with the Secretary of Agriculture and Respondent Marysville's tax return, both of which cover the period February 1, 1995, through January 31, 1996, indicate that Respondents were not properly reporting Respondent Marysville's current assets and liabilities, operating losses, negative retained earnings, and expenses to the Secretary of Agriculture (Tr. 55-59; CX 2, CX 40). These discrepancies indicate that Respondent Marysville was used as means of transferring money to Respondent Breeding's auction market without regard to the solvency of Respondent Marysville and the ability of Respondent Marysville to pay for livestock, as required by the Packers and Stockyards Act.

Respondents failed to pay 27 producers who had sold $76,323.51 in hogs to Respondents in December 1996 and January 1997, and another 15 producers who had sold hogs to Respondents had checks totaling $87,634.50 returned to them in January 1997 because of insufficient funds.

I find that, under the circumstances, Respondents engaged in such gross neglect of known duties that their violations of the Packers and Stockyards Act are the equivalent of intentional violations and that Respondents' violations were willful both under the standard for willfulness applied by the USDA and under the standard for willfulness applied by the United States Court of Appeals for the Tenth Circuit.

Appeal Petitions

Complainant raises ten issues in Complainant's Appeal Petition. First, Complainant contends that the ALJ erred in the willfulness standard he applied (Complainant's Appeal Pet. at 3-8).

I agree with Complainant's contention that the ALJ erroneously failed to apply the standard for willfulness, adopted by the United States Court of Appeals for the Tenth Circuit, to determine whether Respondents' violations of the Packers and Stockyards Act were willful.

The Judicial Officer has long held that a violation of the Packers and Stockyards Act is willful within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.[6] The ALJ concluded that Respondents' violations of the Packers and Stockyards Act were willful under the USDA's standard of willfulness. I agree with the ALJ that Respondents' violations of 7 U.S.C. §§ 213(a) and 228b were willful under the standard for willfulness applied by the USDA.

However, Complainant contends that, when determining whether a violation of the Packers and Stockyards Act by a respondent located within the Tenth Circuit is willful, administrative law judges are required to use both the standard for willfulness adopted by the USDA and the standard for willfulness adopted by the United States Court of Appeals for the Tenth Circuit. I agree with Complainant.

The standard adopted in *Capitol Packing Co. v. United States,* 350 F.2d 67, 78-79 (10th Cir. 1965), is that willfulness must be demonstrated by "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." As discussed in this Decision and Order, *supra*, the record establishes that Respondents' violations of 7 U.S.C. §§ 213(a) and 228b were willful both under the standard applied by the USDA and under the standard appled by the United States Court of Appeals for the Tenth Circuit.

Second, Complainant contends that the ALJ erroneously concluded that he was required to disregard evidence that Respondents had violated sections 401 and 403 of the Packers and Stockyards Act (7 U.S.C. §§ 221 and 223) and sections 201.97

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[6] *See In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408, 1414 (1998); *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), 54 Agric. Dec. 590, 607 (1995), *aff'd*, 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Hardin County Stockyards, Inc.* (Decision as to Hardin County Stockyards, Inc., and Rex Lineberry), 53 Agric. Dec. 654, 658 (1994); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511, 1529 (1993), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1772 (1991); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1071-74 (1990); *In re Ozark County Cattle* Co. (Decision as to National Order Buying Co. and Thomas D. Runyan), 49 Agric. Dec. 336, 355 (1990); *In re Top Livestock Co.*, 49 Agric. Dec. 294, 302 (1990); *In re Modesto Mendicoa*, 48 Agric. Dec. 409, 416 (1989); *In re Hugh T. (Tip) Hennessey*, 48 Agric. Dec. 320, 324 (1989); *In re Danny Cobb*, 48 Agric. Dec. 234, 280 (1989); *In re Edward Tiemann*, 47 Agric. Dec. 1573, 1578 (1988); *In re Paul Rodman*, 47 Agric. Dec. 885, 920 (1988); *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. 1216, 1225 (1987); *In re Robert E. Parchman*, 46 Agric. Dec. 791, 796 (1987), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Doug Welch*, 45 Agric. Dec. 1932, 1951-52 (1986); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1095 (1986), *aff'd*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 621 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Robert E. Stafford*, 43 Agric. Dec. 1833, 1837 (1984), *aff'd*, 782 F.2d 1049 (8th Cir. 1985) (unpublished); *In re Donald Hageman*, 42 Agric. Dec. 531, 544 (1983); *In re Hugh B. Powell*, 41 Agric. Dec. 1354, 1362 (1982); *In re J.A. Speight*, 33 Agric. Dec. 280, 302 (1974); *In re James J. Miller*, 33 Agric. Dec. 53, 83 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 609 (1968).

and 203.10 of the Regulations (9 C.F.R. §§ 201.97 and 203.10) (Complainant's Appeal Pet. at 8-10).

I agree with Complainant's contention that the ALJ erroneously concluded that he was required to disregard evidence that Respondents violated 7 U.S.C. §§ 221 and 223 and 9 C.F.R. §§ 201.97 and 203.10.

The ALJ states that:

> . . . [Complainant] further contends that Respondents violated sections 401 and 403 of the Act (7 U.S.C. §§ 221, 223) and sections 201.97 and 203.10 of the regulations (9 C.F.R. §§ 201.97 and 203.10). These contentions were not made a part of the allegations in the complaint in this proceeding. The Department has held that "in order to comply with the Administrative Procedure Act and the Rules of Practice, the complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and in order to comply with the Due Process Clause of the Fifth Amendment to the Constitution of the United States, the complaint must apprise Respondent of the issues in controversy." *Peter A. Lang d/b/a Safari West*, 57 Agric. Dec. 91, 104 (1998). The allegations against Respondents which were not alleged in the complaint will therefore not be considered.

Initial Decision and Order at 6.

I agree with the ALJ that the Complaint does not allege that Respondents violated 7 U.S.C. §§ 221 and 223 and 9 C.F.R. §§ 201.97 and 203.10. However, Complainant neither introduced evidence in an attempt to prove that Respondents violated 7 U.S.C. §§ 221 and 223 and 9 C.F.R. §§ 201.97 and 203.10 nor requested that the ALJ conclude that Respondents violated 7 U.S.C. §§ 221 and 223 and 9 C.F.R. §§ 201.97 and 203.10. Instead, I find that the discussion in Complainant's Brief of 7 U.S.C. §§ 221 and 223 and 9 C.F.R. §§ 201.97 and 203.10 is only argument to support Complainant's contention that Respondents willfully violated 7 U.S.C. §§ 213(a) and 228b. The Complaint alleges that Respondents purchased livestock and failed to pay, when due, the full purchase price of such livestock and issued checks in purported payment of the purchase price of livestock, which checks were returned by the bank upon which the checks were drawn because there were not sufficient funds on deposit and available in the account to pay such checks when presented, in willful violation of 7 U.S.C. §§ 213(a) and 228b (Compl. ¶¶ II(a), III(a), IV). Therefore, the Complaint apprises Respondents of the issues in controversy. I do not find that consideration of evidence that Respondents violated provisions of the Packers and Stockyards Act and the Regulations that are not alleged in the Complaint, merely for the purpose of determining whether Respondents willfully violated the provisions of the Packers and Stockyards Act alleged in the Complaint, violates the Administrative Procedure Act, the Rules of

Practice, or the Due Process Clause of the Fifth Amendment to the United States Constitution.

Moreover, *In re Peter A. Lang*, 57 Agric. Dec. 91 (1998) (Order Denying Pet. for Recons.), relied upon by the ALJ, is inapposite. In *Lang*, the respondent contended that the allegations in the complaint caused him to lose business and ruined his reputation. I stated that, while it is unfortunate that mere allegations in a complaint would harm a respondent's business and reputation, the complaint must include allegations of fact and provisions of law that constitute the basis for the proceeding and must apprise the respondent of the issues in controversy. *Id.* at 102-05. *Lang* does not involve a complainant's discussion of evidence of violations in addition to those alleged in the complaint, as occurred in this proceeding.

Third, Complainant contends that the ALJ erroneously failed to find that Respondent Breeding was the *alter ego* of Respondent Marysville (Complainant's Appeal Pet. at 10-13).

I agree with Complainant that the ALJ's failure to find that Respondent Breeding was the *alter ego* of Respondent Marysville was error. The test to determine whether an individual is the corporation's *alter ego* is a practical one based on the particular factual circumstances.[7] The inquiry as to whether an individual is the *alter ego* of a corporation focuses on control of the corporation. Control must be active and substantial, though it need not be exclusive.[8] In general, the corporate form may be ignored whenever the individual so dominates the corporation as in reality to negate its separate personality.[9] Among the factors to be examined to determine whether an individual is the *alter ego* of a corporate entity are: (1) whether the corporation was formed at the direction of the individual; (2) whether the individual exercised substantial control over the

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[7] *See Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 209 (5th Cir. 1996) (stating that resolution of *alter ego* issues must be based on a consideration of the totality of the circumstances); *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 211 (4th Cir. 1991) (stating that a totality of the circumstances test is used in determining whether to pierce the corporate veil, and each case must be decided on its own facts); *Valley Finance, Inc. v. United States*, 629 F.2d 162, 172 (D.C. Cir. 1980) (stating that the test for determining whether a corporation is simply the *alter ego* of its owners is a practical one based largely on a reading of the particular factual circumstances); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684-85 (4th Cir. 1976) (stating the issue of whether to disregard the corporate fiction is one of fact); *In re Lemmy Wilson Livestock, Inc.*, 49 Agric. Dec. 379, 416 (1990) (stating that the question of *alter ego* status is one of fact).

[8] *See Valley Finance, Inc. v. United States*, 629 F.2d 162, 172 (D.C. Cir. 1980) (stating that control by the individual must be active and substantial, but it need not be exclusive in a hyper technical or day-to-day sense).

[9] *See Valley Finance, Inc. v. United States*, 629 F.2d 162, 172 (D.C. Cir. 1980) (stating that the court may ignore existence of the corporate form whenever an individual so dominates his organization as to negate its separate personality).

corporation; (3) whether corporate and individual funds were commingled; (4) whether persons other than the individual alleged to be the *alter ego* of the corporate entity functioned as directors or officers; (5) whether corporate formalities, such as keeping of corporate records, were observed; and (6) whether the corporate entity was a facade for operations of the individual.[10] An examination

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[10] *See Ost-West-Handel Bruno Bischoff GMBH v. Project Asia Line,* Inc., 160 F.3d 170, 174 (4th Cir. 1998) (stating that the factors that guide the determination of whether one entity constitutes the *alter ego* of another include gross undercapitalization, insolvency, siphoning of funds, failure to observe corporate formalities and maintain proper corporate records, non-functioning of officers, control by a dominant stockholder, and injustice or fundamental unfairness); *LiButti v. United States*, 107 F.3d 110, 119 (2d Cir. 1997) (stating that factors employed under *alter ego* analysis include the intermingling of corporate and personal funds, undercapitalization of the corporation, failure to observe corporate formalities, failure to pay dividends, insolvency at the time of a transaction, siphoning of funds by the dominant shareholder, and the inactivity of other officers and directors); *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993) (concluding the federal common law doctrine of piercing the corporate veil under an *alter* ego theory is a two part test – (1) was there such unity of interest and lack of respect given the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct and (2) would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations; and stating that, under the separate corporate identity prong, we consider the degree to which the corporate legal formalities have been maintained and the degree to which individual and corporate assets and affairs have been commingled); *United States v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987) (stating that, when determining whether to pierce the corporate veil considerable weight is attached to the respect given the corporate form by the corporation's officers and shareholders and a variety of factors are to be considered in this regard, including – (1) whether the corporation is operated as a separate entity, (2) commingling of funds and other assets, (3) failure to maintain adequate corporate records or minutes, (4) the nature of the corporation's ownership and control, (5) the absence of corporate assets and undercapitalization, (6) use of the corporation as a mere shell, instrumentality, or conduit of an individual or another corporation, (7) disregard of legal formalities and the failure to maintain an arms-length relationship among related entities, and (8) diversion of corporate funds or assets to noncorporate uses); *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985) (stating that courts have applied a variety of factors in determining whether a corporate entity should be disregarded and citing with approval cases in which the following factors were examined: the amount of respect given to the corporation by the stockholders, the degree of injustice visited on litigants by recognition of the corporate entity, the fraudulent intent of the incorporators, the capitalization of the corporation, the existence of corporate records, the separation of corporate and individual finances, the use of the corporation to promote fraud or illegality, and the observance of corporate formalities); *Labadie Coal Co. v. Black*, 672 F. 2d 92, 96-99 (D.C. Cir. 1982) (stating that several factors have been helpful in deciding when to pierce the corporate veil: dominance of the corporation by the individual alleged to be the *alter ego* of the corporation, the failure to maintain corporate minutes or adequate corporate records, the failure to maintain corporate formalities necessary for issuance or subscription of stock, commingling of corporate and individual funds and other assets, diversion of the corporation's funds or assets to non-corporate uses, and the use of the same office or business location by the corporation and its individual shareholders); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co*., 540 F.2d 681, 686-87 (4th Cir. 1976) (stating that factors that are examined in the application of the *alter ego* doctrine include undercapitalization of the corporation, failure to observe corporate fomalities, non-payment of dividends, insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade

of these factors reveals that, at all times material tothis proceeding, Respondent Breeding was the *alter ego* of Respondent Marysville.

The ALJ found, and the record establishes, that Respondent Breeding formed Respondent Marysville, Respondent Breeding was the president and sole stockholder of Respondent Marysville, and Respondent Breeding was responsible for the direction, management, and control of Respondent Marysville (Initial Decision and Order at 2, 12-13). Respondent Breeding commingled Respondent Marysville's funds with those of Respondent Breeding's other corporations (Tr. 322, 341-43, 348). Respondent Breeding was the only active officer and sole director of Respondent Marysville (CX 1, CX 35, CX 40 at 15). The manner in which Respondent Breeding operated Respondent Marysville's finances (Tr. 340-44) leads me to conclude that Respondent Marysville was a facade for operations of Respondent Breeding. The record establishes Respondent Breeding exercised almost exclusive control over Respondent Marysville and its finances and that Respondent Breeding did not treat Respondent Marysville as an independent business.

Moreover, the corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a federal regulatory statute.[11] State law and common law limitations on the *alter ego* theory or doctrine

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for the operations of the dominant stockholder or stockholders); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 638 (8th Cir. 1975) (stating that the corporate form may be disregarded if – (1) the corporation is undercapitalized, (2) the corporation does not have separate books, (3) the corporation's finances are not kept separate from individual finances, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed, or (6) the corporation is merely a sham).

[11] *See Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir. 1978) (stating that the corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute); *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 984-86 (9th Cir. 1971) (holding that the Secretary of Agriculture may issue a cease and desist order under the Packers and Stockyards Act against the corporate president as the *alter ego* of the corporation to effectuate the purposes of the Packers and Stockyards Act); *Bruhn's Freezer Meats of Chicago, Inc. v. United States Dep't of Agric.*, 438 F.2d 1332, 1343 (8th Cir. 1971) (stating that the law is well settled that the corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute); *Joseph A. Kaplan & Sons, Inc. v. FTC*, 347 F.2d 785, 787 n.4 (D.C. Cir. 1965) (stating that the corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute); *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956) (stating that the existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute); *Alabama Power Co. v. McNinch*, 94 F.2d 601, 618 (2d Cir. 1937) (stating that it is well settled that the corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute); *In re Stull Meats, Inc.* (Decision as to Globe Packing Co. and Reuben Krasn), 49 Agric. Dec. 309, 328 (1990) (stating that where it is found that a closely held corporate entity has been misused and is in violation of the Packers and Stockyards Act, or it would effectuate the statutory policy embodied in the Packers and Stockyards Act, the corporate veil should be pierced to make the order, including the civil penalty, applicable to the

are not controlling in determining the permitted scope of remedial orders under federal regulatory statutes.[12] Thus, even if I found that the strict standards of state law or common law *alter ego* doctrine are not satisfied, I would still find that Respondent Breeding was, at all times material to this proceeding, the *alter ego* of Respondent Marysville.

Respondents contend that the Complaint does not allege that Respondent Breeding was the *alter ego* of Respondent Marysville; therefore, the ALJ properly refused to find that Respondent Breeding was the *alter ego* of Respondent Marysville (Respondents' Response to Complainant's Appeal Pet. at 10). However, the *alter ego* doctrine is an equitable doctrine that may be invoked whenever the facts warrant its use.[13] As fully discussed in this Decision and Order, *supra*, the

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responsible individual), *appeal dismissed*, No. 90-70191 (9th Cir. Jan. 11, 1991); *In re Johnson-Hallifax, Inc.*, 47 Agric. Dec. 430, 435 (1988) (stating that in closely held corporations, the corporate veil is pierced to make the order applicable to the responsible owners and officers of the corporation); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 311 (1988) (stating that the USDA's practice of piercing the corporate veil to expose respondents to liability for their wholly-owned companies' wrongdoing is routine), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988).

[12] *See Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (stating that in determining whether to disregard the corporate form, we must consider the importance of that form in the federal statutory scheme, an inquiry that generally gives less deference to the corporate form than does the strict *alter ego* doctrine of state law); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (stating that when determining whether to disregard the corporate entity in federal cases, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) (stating that the strict standards of common law *alter ego* doctrine, which would apply in a tort or contract action, do not apply in an FCC licensing proceeding); *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 985 (9th Cir. 1971) (stating that state law limitations on the *alter ego* theory or doctrine are not necessarily controlling in determining the permitted scope of remedial orders under federal regulatory statutes); *In re Midland Banana & Tomato Co., Inc.*, 54 Agric. Dec. 1239, 1306-09 (1995) (stating that state corporation law does not control when a federal regulatory agency is applying *alter ego* theory), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); In *re Lloyd Meyers Co., Inc.*, 51 Agric. Dec. 747, 769-72 (1992) (stating the position taken by the respondents that state law applies where the *alter ego* of a corporation maneuvers to escape the reach of a federal regulatory agency, is without merit).

[13] *See Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.*, 417 U.S. 703, 713 (1974) (stating that the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy); *718 Arch Street Associates, Ltd. v. Blatstein*, 192 F.3d 88, 100 (3d Cir. 1999) (stating that a court should use its equitable powers to disregard the corporate form to prevent fraud, illegality, injustice, or a contravention of public policy); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981) (stating that the general rule adopted in federal cases is that a corporate entity may be disregarded in the interests of public convenience, fairness, and equity); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974) (stating that courts have consistently recognized that a corporate entity may be disregarded in the interests of public convenience, fairness, and equity).

facts warrant finding that Respondent Breeding was the *alter ego* of Respondent Marysville.

Fourth, Complainant contends that the ALJ's 2-year suspension of Respondents as registrants under the Packers and Stockyards Act is inadequate (Complainant's Appeal Pet. at 13-14).

I agree with Complainant's contention that the ALJ's 2-year suspension of Respondents as registrants under the Packers and Stockyards Act is inadequate. The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Raymond Minks, the Assistant Director, Office of Policy/Litigation Support, Packers and Stockyards Programs, testified that the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, the agency charged with administering the Packers and Stockyards Act, recommended a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act, as follows:

> JUDGE HUNT: Mr. Paul?
>
> MR. PAUL: I have Mr. Minks recalled for sanction.

Whereupon,

RAYMOND MINKS

having been previously duly sworn, was recalled as a witness herein and was examined and testified further as follows:

> JUDGE HUNT: You're still under oath.
>
> THE WITNESS: Yes, Your Honor.

DIRECT EXAMINATION

BY MR. PAUL:

Q. Mr. Minks, have you been authorized to give a sanction recommendation for the Packers and Stockyards Program, the Complainant in this proceeding?

A. Yes.

Q. And is that a normal part of the course of your duties?

A. In my current job, I probably will not be doing it that often; it's been a common occurrence in my previous position.

Q. And what is the position of Packers and Stockyards Program regarding the allegations of failure to pay when due and failure to pay for livestock?

A. Failure to pay when due and failure to pay are considered violations of Section 312(a) of the Act since the buyer has an obligation to pay in accordance with Section 409 of the Act.

Q. And what type of violation are they considered?

A. They're unfair and deceptive practices under Section 312(a) of the Act.

Q. And what is the seriousness of those?

A. Those are serious violations.

Q. And what is the position of the Packers and Stockyards Program regarding allegation of issuance of insufficient funds checks in payment for livestock?

A. Those are considered unfair and deceptive practices under Section 312(a) of the Act since the seller has been given a check which purports to be payment under Section 409 of the Act but is later dishonored.

Q. And are they also considered unfair and deceptive?

A. Yes.

Q. Now, does it make any difference if the issuing firm was relying upon a bank line of credit?

A. No, it does not.

Q. Why not?

A. Because such line of credit or overdraft protection, or whatever the arrangement was, provides no protection to livestock sellers in cases such as Marysville.

Q. What about the sanction that would be -- is recommended for failure to pay of the magnitude involved here?

A. My agency would recommend an order be issued ordering the Respondents to cease and desist the violations and suspending the Respondents for a period of five years, with a proviso that Mr. Breeding could be an employee of another registrant or packer after 150 days of the suspension have been served.

Q. Now, is that five years suspension length standard, heavy, light?

A. It is a sanction that is in accordance with sanctions issued in previous cases.

Q. Is it what is typically asked for in a failure to pay that is more than a diminimus [sic] amount?

A. It is the normal sanction my agency asks for in a failure to pay case, yes.

Q. And with respect to the issuance of NSF checks, does that violation add to the length of the suspension requested or not?

A. It does not.

Q. You lump them together?

A. No, we do not stack sanctions. The sanction of five years that I just testified to is based on failure to pay; there is no additional sanction for the

NSF checks that is recommended.

Q. Other than a cease and desist provision specific to that.

A. Yes, sir.

Tr. 391-94.

The ALJ correctly notes that a 5-year suspension of registration is often imposed in cases, such as the instant case, where a respondent has failed to pay, when due, the full purchase price for livestock, in willful violation of the Packers and Stockyards Act (Initial Decision and Order at 12).[14] The ALJ states that he imposed

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[14] *See In re Hines and Thurn Feedlot, Inc.*, 57 Agric. Dec. 1408 (1998) (suspending the respondents as registrants under the Packers and Stockyards Act for a period of 5 years for issuing checks in payment for livestock without maintaining sufficient funds on deposit and available to pay such checks when presented, failing to pay, when due, the full purchase price of livestock, and failing to pay the full purchase price of livestock, in willful violation of 7 U.S.C. §§ 213(a), 221, and 228b and 9 C.F.R. § 201.43); *In re Jeremy Byrd*, 55 Agric. Dec. 443 (1996) (prohibiting the respondent from becoming registered under the Packers and Stockyards Act for a period of 5 years for failing to register, failing to file an adequate bond, failing to pay, when due, the full purchase price of livestock, issuing checks in payment for livestock without maintaining sufficient funds on deposit and available to pay such checks when presented, and failing to pay the full purchase price of livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b and 9 C.F.R. §§ 201.29 and 201.30); *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), 54 Agric. Dec. 590 (1995) (suspending the respondents as registrants under the Packers and Stockyards Act for a period of 5 years for, *inter alia*, issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented, failing to pay, when due, the full purchase price of livestock, and failing to pay the full purchase price of livestock, in willful violation of 7 U.S.C. §§ 213(a), 221, and 228b), *aff'd*, 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Bruce Thomas*, 53 Agric. Dec. 1569 (1994) (suspending the respondent as a registrant under the Packers and Stockyards Act for a period of 5 years for issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available to pay such checks when presented, failing to pay, when due, the full purchase price of livestock, and failing to pay the full purchase price of livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b); *In re Syracuse Sales Co.* (Decision as to John Knopp), 52 Agric. Dec. 1511 (1993) (prohibiting the respondent from becoming registered under the Packers and Stockyards Act for a period of 5 years for engaging in business while insolvent and failing to pay, when due, the full purchase price of livestock, in willful violation of 7 U.S.C. §§ 213(a) and 228b), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); *In re Jimmy Ray Hendren*, 51 Agric. Dec. 672 (1992) (suspending the respondent as a registrant under the Packers and Stockyards Act for a period of 5 years for issuing checks in payment for livestock without maintaining sufficient funds on deposit and available to pay such checks when presented, failing to pay, when due, the full purchase price of livestock, failing to pay the full purchase price of livestock, and failing to file and maintain an adequate bond, in willful violation of 7 U.S.C. §§ 213(a) and 228b and 9 C.F.R. §§ 201.29 and 201.30); *In re David H. Harris*, 51 Agric. Dec. 649 (1992) (suspending the respondent as a registrant under the Packers and Stockyards Act for a period of 5 years for issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented, failing to pay, when due, the full purchase price of livestock, and failing to pay for livestock purchases, in willful violation of 7 U.S.C. §§ 213(a) and 228b); *In re Jeff Palmer*, 50 Agric. Dec. 1762

only a 2-year suspension of Respondents as registrants under the Packers and Stockyards Act because he did not find that Respondent Breeding was the *alter ego* of Respondent Marysville, Respondent Breeding did not act recklessly, Respondent Breeding's violations were not intentional, and Respondent Breeding has operated for 40 years without committing any misdeeds (Initial Decision and Order at 12).

Respondent Breeding's *alter ego* status is not relevant to the period of suspension imposed on Respondent Marysville. Further, since the ALJ concluded that Respondent Breeding violated 7 U.S.C. §§ 213(a) and 228b in his individual capacity, a finding that Respondent Breeding was not the *alter ego* of Respondent Marysville would not affect the period of suspension to be imposed on Respondent Breeding. Finally, as discussed in this Decision and Order, *supra*, I find that Respondent Breeding was, at all times material to this proceeding, the *alter ego* of Respondent Marysville.

Complainant does not contend that Respondents deliberately purchased livestock intending to fail to pay the sellers. However, Respondent Breeding failed to oversee the operation of Respondent Marysville and maintain records in a manner that would enable him to ensure that there were sufficient funds available to pay producers who sold livestock to Respondent Marysville. The Packers and Stockyards Act explicitly requires dealers purchasing livestock to pay the full purchase price of the livestock (7 U.S.C. § 228b(a)). Respondents did not comply with this explicit statutory requirement. Respondents are required to operate with adequate finances to ensure that livestock sellers are paid. I find that Respondents engaged in such gross neglect of known duties that their violations of the Packers and Stockyards Act are the equivalent of intentional violations.

Moreover, Respondents violations were not *de minimis*. Respondents failed to pay 27 producers who had sold $76,323.51 in hogs to Respondents in December 1996 and January 1997, and another 15 producers who had sold hogs to Respondents had checks totaling $87,634.50 returned to them in January 1997 because of insufficient funds.

I find that, under the circumstances, a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act is necessary to deter Respondents and other similarly situated persons from future violations of 7 U.S.C. §§ 213(a) and 228b. A 5-year suspension of Respondents as registrants under the Packers and Stockyards Act is in accord with the USDA's sanction policy, the sanction recommendation of the administrative officials charged with achieving the

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(1991) (suspending the respondent as a registrant under the Packers and Stockyards Act for a period of 5 years for willful violations of 7 U.S.C. §§ 204, 213(a), and 228b); *In re Sam Odom*, 48 Agric. Dec. 519 (1989) (suspending the respondent as a registrant under the Packers and Stockyards Act for a period of 5 years for issuing checks in payment for livestock without having sufficient funds on deposit and available to pay such checks when presented, failing to pay, when due, the full purchase price of livestock, and failing to pay for livestock purchases, in violation of the Packers and Stockyards Act).

congressional purpose of the Packers and Stockyards Act, and the periods of suspension imposed in similar cases.[15]

Fifth, Complainant contends that the ALJ erroneously found that Respondent Breeding established Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., in 1994 (Complainant's Appeal Pet. at 14-15).

I agree with Complainant that the ALJ erroneously found that Respondent Breeding established Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., in 1994. The record supports a finding that Respondent Breeding established a corporation identified as Marysville Enterprises in 1979 (CX 40) and that in 1994, Respondent Breeding registered Marysville Enterprises, Inc., d/b/a Marysville Hog Company, as a dealer with the Packers and Stockyards Administration in 1994 (Tr. 181-82; CX 1 at 4).

Sixth, Complainant contends that the ALJ erroneously found that Respondent Breeding established Respondent Marysville for the purpose of buying hogs from farmers and producers for resale to packer-owned buying stations and to order buyers (Complainant's Appeal Pet. at 14-15).

I agree with Complainant's contention that the ALJ erroneously found that Respondent Breeding established Respondent Marysville for the purpose of buying hogs from farmers and producers for resale to packer-owned buying stations and to order buyers. The record establishes that Respondent Breeding formed Respondent Marysville for the purpose of buying hogs from producers and other dealers for resale to packers for slaughter, and that, except for a small number of feeder pigs, Respondent Marysville sold its hogs directly to packers (Tr. 180-88, 210-11, 239-40).

Seventh, Complainant contends that the ALJ erroneously found that the 7-day period from the time Respondents' hogs were delivered to a buying station until Respondent Marysville received payment was referred to as the "pipeline," "inventory," or "accounts receivable" (Complainant's Appeal Pet. at 15).

I agree with Complainant that the ALJ erroneously found that the 7-day period from the time Respondents' hogs were delivered to a buying station until Respondent Marysville received payment was referred to as the "pipeline," "inventory," or "accounts receivable." Instead, the record establishes that the 5- to 7-day period between Respondent Marysville's sale of hogs to a packer for slaughter and the receipt of payment was referred to as the "pipeline," "inventory," or "accounts receivable" (Tr. 130-31, 184, 318-19).

Eighth, Complainant contends that the ALJ erroneously implies that the weights which hog sellers provided to Mr. Thoreson were inaccurate or unreliable (Complainant's Appeal Pet. at 15-16).

I disagree with Complainant's contention that the ALJ erroneously implies that the weights which hog sellers provided to Mr. Thoreson were inaccurate or

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[15]See note 14.

unreliable. The ALJ states, as follows:

> The hog producers would either deliver [the hogs] to Thoreson at the sale barn, where Thoreson, sometimes with assistance from Breeding, would weigh the hogs, or the producers would deliver the hogs themselves, or through trucks provided by Thoreson, directly to the buying stations. Thoreson said he relied on the word of the sellers for the number and weight of the hogs. He said he would also get a count from the truck drivers but indicated that their count was not very reliable.

Initial Decision and Order at 2.

The record establishes that Mr. Thoreson found that the hog sellers provided him with accurate weights (Tr. 185, 213-18). However, the ALJ does not, as Complainant contends, imply that the weights provided by hog producers and relied upon by Mr. Thoreson were inaccurate or unreliable.

Ninth, Complainant contends that the ALJ erroneously indicates that Respondent Marysville handled hogs valued up to $750,000 a week and up to $39,000,000 a year (Complainant's Appeal Pet. at 16).

I disagree with Complainant's contention that the ALJ erroneously indicates that Respondent Marysville handled hogs valued up to $750,000 a week and up to $39,000,000 a year. The ALJ states that "Thoreson bought up to six loads of hogs a day with each load comprising 180 to 220 hogs and valued up to $25,000." (Initial Decision and Order at 3.) The record supports the ALJ's statement (Tr. 206-07, 318). Using these figures, assuming a 5-day work week, Respondent Marysville could have handled hogs valued up to $750,000 a week and up to $39,000,000 a year, if it handled the maximum number of loads of hogs 5 days a week every week during any year. However, the ALJ made no projection that Respondent Marysville handled six loads of hogs 5 days a week during each week of any year. Instead, the ALJ states that "[o]ver the next three years the Company's sales volume more than doubled. Sales for the first year of about $4,000,000 increased to over $9,000,000 for the year ending January 15, 1997." (Initial Decision and Order at 3.) Therefore, I find no basis for Complainant's contention that the ALJ indicates that Respondent Marysville handled hogs valued up to $750,000 a week and up to $39,000,000 a year.

Tenth, Complainant contends that the ALJ erroneously found that the Exchange National Bank provided Respondent Marysville with overdraft protection in return for which Exchange National Bank handled, but was not required to pay interest on, multiple custodial accounts controlled by Respondent Breeding (Complainant's Appeal Pet. at 16).

I agree with Complainant that the ALJ's reference to multiple custodial accounts is error. The record establishes that the Exchange National Bank's provision of overdraft protection to Respondent Marysville was an extension of a service in

exchange for the bank's handling of a single custodial account and not, as the ALJ indicates, in exchange for the bank's handling multiple custodial accounts (Tr. 303, 426-28).

Respondents raise three issues in Respondents' Brief in Support of Petition for Appeal [hereinafter Appeal Petition]. First, Respondents contend that the ALJ applied the incorrect standard for determining willful violations under the Packers and Stockyards Act. Respondents contend that the correct standard for determining willfulness in a proceeding which can be appealed to the United States Court of Appeals for the Tenth Circuit is the standard adopted by the Tenth Circuit in *Capitol Packing Co. v. United States, supra* (Respondents' Appeal Pet. at 2-4).

The Judicial Officer once opined that the United States Court of Appeals for the Tenth Circuit's standard for determining willfulness, adopted in *Capitol Packing Co.*, would seem to have been rendered nugatory by the High Court's decision in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973).[16] The Court stated (411 U.S. at 185):

> The Court of Appeals agreed that 7 U.S.C. § 204 authorized the Secretary to suspend "any registrant found in violation of the Act," 454 F.2d at 113, that the suspension procedure here satisfied the relevant requirements of the Administrative Procedure Act, 5 U.S.C. § 558, and that "the evidence indicates that [respondent] acted with careless disregard of the statutory requirements and thus meets the test of 'wilfulness.'"

Referring to the suspension provisions under the Packers and Stockyards Act, the Court in *Butz* stated (411 U.S. at 187 and n.5):

> Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application to cases of negligent or careless violations.
>
> * * *
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> "Wilfully" could refer to either intentional conduct or conduct that was merely careless or negligent.

However, citing *Murphy v. DEA*, 111 F.3d 140, 1997 WL 196603 (10th Cir. 1997), Respondents correctly point out that the United States Court of Appeals for the Tenth Circuit continues to adhere to the definition of willfulness in *Capitol Packing Co.* Therefore, I agree with Respondents that the ALJ should have applied both the standard adopted by the USDA and the standard adopted by the United

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[16] *See In re J.A. Speight*, 33 Agric. Dec. 280, 303 (1974).

States Court of Appeals for the Tenth Circuit in *Capitol Packing Co. v. United States, supra*, to determine whether Respondents' violations of the Packers and Stockyards Act were willful. As discussed in this Decision and Order, *supra*, I have applied the willfulness standard adopted by the USDA and the willfulness standard adopted by the Tenth Circuit and find that Respondents willfully violated 7 U.S.C. §§ 213(a) and 228b under both standards.

Second, Respondents contend that the 2-year suspension of Respondent Breeding's registration under the Packers and Stockyards Act imposed by the ALJ, is excessive (Respondents' Appeal Pet. at 5-6).

I disagree with Respondents' contention that the 2-year suspension of Respondent Breeding as a registrant under the Packers and Stockyards Act, imposed by the ALJ, is excessive. As discussed in this Decision and Order, *supra*, I find that the 2-year suspension of Respondent Breeding, imposed by the ALJ, was not adequate, and I impose a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act.

Respondents contend that a 2-year suspension of Respondent Breeding as a registrant under the Packers and Stockyards Act is excessive because Respondent Breeding's violations were not intentional or reckless (Respondents' Appeal Pet. at 5). However, as fully discussed in this Decision and Order, *supra*, I find that Respondent Breeding's violations resulted from Respondent Breeding's gross neglect of known duties such that his violations of the Packers and Stockyards Act are the equivalent of intentional violations.

Further, Respondents contend that a 2-year suspension of Respondent Breeding under the Packers and Stockyards Act is excessive because Respondent Breeding has been in the livestock business for over 40 years and has never committed any misdeeds under the Packers and Stockyards Act (Respondents' Appeal Pet. at 5). Given the number of Respondents' violative transactions and the dollar amounts involved, a severe sanction is warranted. Further, I give great weight to the sanction recommendations of administrative officials. Mr. Minks, the Assistant Director, Office of Policy/Litigation Support, Packers and Stockyards Programs, testified that the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, the agency charged with administering the Packers and Stockyards Act recommended a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act (Tr. 392-96). Finally, a 5-year suspension of Respondents as registrants under the Packers and Stockyards Act is consistent with the sanctions imposed in other cases involving failures to pay for livestock.[17] Therefore, I do not find Respondent Breeding's 40-year involvement in the livestock business, with no prior violations of the Packers and Stockyards Act, sufficiently mitigating to warrant the reduction of the 5-year period of suspension normally imposed for violations of the type committed by Respondents.

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[17]See note 14.

Respondents also contend that the suspension requested by Complainant is excessive because Respondents relied on the bank to pay sellers (Respondents' Brief 10-11, 16-17). However, Respondents' reliance on a bank to pay its sellers is not a mitigating circumstance.[18] The Packers and Stockyards Act places the duty to pay livestock sellers on each dealer who purchases livestock. There is no provision in the Packers and Stockyards Act or the Regulations which relieves the dealer from the duty to pay for livestock merely because that dealer has a line of credit or overdraft protection from a lending institution.

Respondents further contend that the suspension requested by Complainant is unduly severe because, given Respondent Breeding's age, the suspension would, in effect, permanently bar him from working in the industry (Respondents' Brief 16). However, Respondent Breeding's age is not a mitigating circumstance.[19] Similarly, Respondents contend that a 2-year suspension of Respondent Breeding as a registrant under the Packers and Stockyards Act is excessive because, without a dealer's license, Respondent Breeding's livelihood and ability to earn a living will disappear (Respondents' Appeal Pet. at 5-6). However, I give no weight to collateral effects of a suspension on a respondent. While I empathize with the hardship a suspension may cause a respondent, the hardship a suspension may cause an individual respondent is given no weight in determining the sanction since the national interest of having fair conditions in the livestock industry prevails over the respondent's interest in continuing to conduct business as a registrant under the Packers and Stockyards Act.

Moreover, the Order in this Decision and Order does not operate as an absolute bar to Respondent Breeding's employment in the livestock industry during the period of suspension as a registrant under the Packers and Stockyards Act. There are many occupations in the livestock industry for which registration under the Packers and Stockyards Act is not required. Further, while I suspend Respondent Breeding as a registrant under the Packers and Stockyards Act for 5 years, I also provide in the Order that, upon application to the Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued permitting the salaried employment of Respondent Breeding by another registrant or packer after the expiration of the initial 150 days of the 5-year period of suspension and upon demonstration of circumstances warranting modification of the Order.

Third, Respondents contend that the automatic revocation of a property right without a sufficient standard violates due process (Respondents' Appeal Pet. at 6-7).

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[18]See note 3.

[19]*See generally In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating that the respondent's age cannot be considered either as a defense to the respondent's violations of the Animal Welfare Act, as amended, or as a mitigating factor).

Respondents raise the denial of due process for the first time on appeal to the Judicial Officer. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.[20] Respondents' failure, prior to the filing of Respondents' Appeal Petition, to argue that Respondents were denied due process comes too late to be considered.

Even if I found that Respondents timely raised the issue of denial of due process, I would not find that Respondents were denied due process. Respondents have not been "automatically" deprived of a property right and the outcome of the proceeding was not "guaranteed." Instead, the Complaint, served on Respondents more than 7 months prior to the date of the hearing, provides Respondents with notice of the nature of the proceeding, the legal authority and jurisdiction under which the hearing was to be held, and the matters of fact and law asserted, and I find that the Complaint meets the requirements of the Due Process Clause of the Fifth Amendment to the United States Constitution and the Administrative Procedure Act (5 U.S.C. § 554(b)).

Moreover, Respondents were provided with a meaningful opportunity to be heard. Specifically, Respondents had an opportunity, during the hearing, to present testimony, introduce evidence, and cross-examine Complainant's witnesses; had an opportunity, after the hearing, to file post-hearing briefs; and had an opportunity,

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[20] *In re Mary Meyers*, 58 Agric. Dec. ___, slip op. at 6 (Oct. 14, 1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 6 (Aug. 30, 1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); In *re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

after the ALJ issued the Initial Decision and Order, to file an appeal petition and respond to the appeal petition filed by Complainant.

Further, the conclusion that Respondents willfully violated the Packers and Stockyards Act was not "guaranteed," as Respondents contend. The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden is met is the preponderance of the evidence standard.[21] Thus, the conclusion that Respondents willfully violated the Packers and Stockyards Act is far from "guaranteed." Instead, Complainant bears the burden of going forward with evidence that Respondents willfully violated the Packers and Stockyards Act and the standard by which Complainant's burden of persuasion must be met is the preponderance of the evidence standard.

Contrary to Respondents' contention, proof that a respondent violates an act administered by the USDA does not "guarantee" the conclusion that the respondent's violation was willful.[22] My conclusion in this proceeding that Respondents willfully violated 7 U.S.C. §§ 213(a) and 228b is not based on any automatic determination that a respondent who violates the Packers and Stockyards Act does so willfully. Instead, my conclusion that Respondents willfully violated the Packers and Stockyards Act is based on the substantial evidence introduced by Complainant that establishes that Respondents acted with such gross neglect of their

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[21] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S.91, 92-104 (1981); *In re Samuel J. Dalessio, Jr.* (Decision as to Samuel J. Dalessio, Jr., and Douglas S. Dalessio, d/b/a Indiana Farmers Livestock Market, Inc.), 54 Agric. Dec. 590, 608 (1995), *aff'd*, 79 F.3d 1137 (3d Cir. 1996) (Table); *In re Jerald Brown*, 54 Agric. Dec. 537, 552 (1995); *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1779 (1991); *In re Utica Veal Co.*, 49 Agric. Dec. 1096, 1108 (1990); *In re Chatham Area Auction, Cooperative, Inc.*, 49 Agric. Dec. 1043, 1089 (1990); *In re Britton Bros., Inc.*, 49 Agric. Dec. 423, 442 (1990); *In re Lemmy Wilson Livestock, Inc.*, 49 Agric. Dec. 379, 418 (1990); *In re Ozark County Cattle Co.* (Decision as to National Order Buying Co. and Thomas D. Runyan), 49 Agric. Dec. 336, 347-48 (1990); *In re Stull Meats, Inc.* (Decision as to Globe Packing Co. and Reuben Krasn), 49 Agric. Dec. 309, 327 (1990), *appeal dismissed*, No. 90-70191 (9th Cir. Jan. 11, 1991); *In re Top Livestock Co.*, 49 Agric. Dec. 294, 305 (1990); *In re Wilkes County Stock Yard, Inc.*, 48 Agric. Dec. 1015, 1024 (1989); *In re Danny Cobb*, 48 Agric. Dec. 234, 267 (1989); *In re Victor L. Kent & Sons, Inc.*, 47 Agric. Dec. 692, 704 (1988); *In re Gary Chastain*, 47 Agric. Dec. 395, 405 (1988), *aff'd per curiam*, 860 F.2d 1086 (8th Cir. 1988) (unpublished), *printed in* 47 Agric. Dec. 1395 (1988); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 260 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re Robert E. Parchman*, 46 Agric. Dec. 791, 801 (1987), *aff'd*, 852 F.2d 858 (6th Cir. 1988); *In re Doug Welch*, 45 Agric. Dec. 1932, 1939 (1986).

[22] *See In re Peter A. Lang*, 57 Agric. Dec. 59, 80 (1998) (concluding that the respondent violated 9 C.F.R. § 2.131(a)(1), but stating that the respondent's violation was not willful), *aff'd*, 189 F.3d 473 (Table) (9th Cir. 1999) (not to be cited as precedent under 9th Circuit Rule 56-3); *In re Roberts Enterprises, Inc.*, 41 Agric. Dec. 80, 83 (1982) (concluding that the respondent violated 7 U.S.C. § 213(a) and 9 C.F.R. § 201.44, but that there was no basis for overturning the administrative law judge's finding that the violations were merely inadvertent and unintentional lapses warranting no more than a cease and desist order).

known duties under the Packers and Stockyards Act that their violations are the equivalent of intentional violations.

Findings of Fact

1. Respondent Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., is a Kansas corporation whose business address was 1180 Highway 77, Marysville, Kansas 66508 (Amended Answer).

2. Respondent Marysville, at all times material to this proceeding, was:

(a) Engaged in the business of a dealer buying and selling livestock in commerce for its own account; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. Respondent James L. Breeding is an individual whose business mailing address is 1226 Heights Avenue, Marysville, Kansas 66508 (Amended Answer).

4. Respondent Breeding, at all times material to this proceeding, was:

(a) President and sole stockholder of Respondent Marysville;

(b) Responsible for the direction, management, and control of Respondent Marysville;

(c) A dealer within the meaning of the Packers and Stockyards Act; and

(d) The *alter ego* of Respondent Marysville.

5. Respondent Marysville, under the direction, management, and control of Respondent Breeding, purchased livestock and failed to pay, when due, the full purchase price of $76,323.51 for such livestock.

6. Respondent Marysville, under the direction, management and control of Respondent Breeding, issued checks in purported payment for livestock, in the amount of $87,634.58, which checks were returned by the bank upon which they were drawn because the account did not have sufficient funds to cover the checks. At the time Respondents issued the checks, they knew, or should have known, that they did not have sufficient funds on deposit to pay the checks when presented.

Conclusion of Law

Respondent Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and Respondent James L. Breeding willfully violated section 312(a) and section 409 of the Packers and Stockyards Act (7 U.S.C. §§ 213(a) and 228b).

For the foregoing reasons, the following Order should be issued.

Order

Respondent Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., its officers, directors, agents, employees, successors, and assigns, and Respondent

James L. Breeding, his agents and employees, directly or indirectly through any corporate or other device, in connection with their operations as dealers, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;

2 Failing to pay the full purchase price of livestock; and

3. Issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which the checks are drawn to pay such checks when presented.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

Respondent Marysville Enterprises, d/b/a Marysville Hog Buying Co., is suspended as a registrant under the Packers and Stockyards Act for a period of 5 years.

Respondent James L. Breeding is suspended as a registrant under the Packers and Stockyards Act for a period of 5 years; *Provided, however,* That, upon application to the Grain Inspection, Packers and Stockyards Administration, a supplemental order may be issued permitting the salaried employment of Respondent James L. Breeding by another registrant or packer after the expiration of the initial 150 days of the 5-year period of suspension and upon demonstration of circumstances warranting modification of this Order.

The registrant-suspension provisions of this Order shall become effective on the 60th day after service of this Order on Respondents.

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